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IN THE

# Supreme Court of the United States

October Term, 1957

No. 100

GILBERT GREEN and HENRY WINSTON,

*Petitioners,*

—v.—

THE UNITED STATES OF AMERICA,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

### I. The Insufficiency of the Evidence.

In our principal brief, we showed that petitioners' convictions cannot be sustained on the theory that they had actual knowledge of the order of July 2, 1951 because there was no evidence of such knowledge (Pet. Br., 12-14).[1] We further showed that the convictions cannot be sustained on the alternative theory that petitioners had notice of the order of July 2 by virtue of knowledge that an application for the order would be made. We demonstrated that the latter theory is fallacious because (1) petitioners were not charged with notice of the order but with actual knowledge of its existence; (2) there was no evidence that petitioners knew that application for the order would be made, and

[1] We designate the brief for petitioners "Pet. Br." and the brief for the United States "Resp. Br."

(3) knowledge that an order will be applied for cannot support a conviction for criminal contempt of the order after it is entered (Pet. Br., 14-20).[2]

Respondent makes a disingenuous attempt to obscure the issues by thoroughly confusing its discussion of these alternative theories of guilt and arguing as though there were no distinction in fact or law between knowledge of the existence of an order and notice of an order arising from knowledge that it will be applied for.[3] When respondent's discussion of the two theories is disentangled, it becomes apparent that it cannot offer a rational defense of either of them.

## A. The knowledge theory.

Respondent contends that the following circumstances establish, beyond a reasonable doubt, that petitioners had actual knowledge of the order of July 2: (1) Petitioners knew, in consequence of the affirmance of their convictions, that their commitment was imminent. (2) They knew that application would be made on July 2 for an order that they

[2] We also showed that the convictions cannot be sustained on the theory that the contempts lay in petitioners' disobedience of an order (presumably made on June 29) for their appearance in court on July 2 (Pet. Br., 20-21). Further discussion of this theory is unnecessary since respondent does not defend it.

[3] The caption to respondent's point I asserts that the evidence supports a finding that petitioners had "notice" of the order (Resp. Br., 22). But the first paragraph of the text states that the evidence showed that petitioners "were well aware of the existence of the order" (*ibid.*). The argument that follows does not discriminate between knowledge and notice. It concludes by reasserting that "petitioners knew of the existence of the order for their surrender" (Resp. Br., 27). But respondent supports this assertion with a quotation from *United States* v. *Hall*, 198 F. 2d 726, holding that Hall was chargeable with *notice* of the order of July 2 because the evidence was sufficient to establish that he had knowledge that the order would be applied for (Resp. Br., 27-28).

surrender on that day.[4] (3) They knew that they were required to appear in court on July 2. (4) They knew that they were fugitives from justice. (5) They must have known that their bail would be terminated (Resp. Br., 22-24).

Respondent says that the foregoing circumstances compel the conclusion that petitioners knew "that the order which they had every reason in the world to expect had in fact been issued" (Resp. Br., 24). It also says that petitioners "knew, on June 29, 1951, that the entry of such an order was * * * both certain and imminent" (Resp. Br., 27). Thus, respondent's argument comes down to the proposition that petitioners had actual knowledge that the order of July 2 had been issued because, prior to that date, they knew with certainty that it would be issued.

Obviously, however, petitioners could not have *known* that the order for their surrender existed before the order was issued. Accordingly, it is impossible to prove that they had knowledge of the existence of the order by evidence of what they knew prior to the time of its issuance. Respondent's argument, therefore, is based on a logical absurdity.

Another flaw in respondent's reasoning is revealed by the concession, elsewhere in its brief, that the *Dennis* defendants appear to be the only persons in the whole of Anglo-American jurisprudence against whom a surrender order was entered after they had absconded (Resp. Br., 33-34, 36-37). Accordingly, nothing in the events prior to July 2 could possibly have conveyed to petitioners knowledge that the court would invoke this unique procedure which had never occurred to generations of astute judges and prosecutors. On the contrary, petitioners "had every reason in the world to expect" that on July 2 they would be treated like all other absconders—*i.e.*, that their bail would be forfeited and bench warrants

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[4] As we later show (*infra*, p. 5), there is no evidence that petitioners had knowledge that this application would be made

issued for their arrest. Had that been the case, petitioners' flight, as respondent concedes, could not have been a contempt (Resp. Br., 37).

Furthermore, it necessarily follows from respondent's argument that petitioners had knowledge of the existence of the order upon its issuance on July 2. Yet respondent makes no such claim. It asserts only that petitioners must have learned of the order "at some point during the prolonged period that they were in hiding" (Resp. Br., 24). But respondent does not cite any evidence (and there is none) of occurrences subsequent to July 2 which informed petitioners that an order for their surrender had been issued. Respondent seeks to fill this void in the evidence by proposing that the Court take judicial notice of newspaper reports of the entry of the order (*ibid.*, ftn. 2). Respondent, of course, means to imply that the convictions should be sustained on the basis of "judicial notice" that petitioners read these reports. This is the best that respondent can offer as satisfying its burden of proof of knowledge beyond a reasonable doubt.

## B. The notice theory.

1. As our principal brief demonstrated, the proposition that a conviction for contempt of an order may be based on knowledge that the order would be applied for is contrary to the authorities and violative of due process (Pet. Br., 17-20). Respondent makes no reply to our constitutional argument. It quotes the passage from *Pettibone* v. *United States*, 148 U. S. 197, upon which the Court in *Hall* relied (Resp. Br., 26). But it does not attempt to answer our demonstration that the Court did not intend its dictum to apply to criminal contempts. *In re Lennon*, 166 U. S. 548, 554, cited by respondent (Resp. Br., 27), confirms our analysis of *Pettibone*. For it flatly holds that "actual notice" of an order is prerequisite to a conviction for criminal contempt.

Respondent also relies (Resp. Br., 25) on the statement in 2 Daniell, *Chancery Pleading and Practice* (4th Amer. ed.), quoted in our principal brief (p. 17) that, "if the party remains in court until the order is about to be made, he cannot, by leaving at that instant, avoid its consequences." The statement is plainly inapplicable. Petitioners were not "in court" on July 2 when "the order was about to be made," nor did they flee "at that instant."[5]

2. As we showed in our principal brief (pp. 22-23), there was no evidence that petitioners knew that an application for a surrender order would be made, and the trial judge made no finding that they had such knowledge. Respondent asserts that petitioners "were being kept advised of developments in their case by the Dennis attorneys, Messrs. Sacher and Isserman" (Resp. Br., 22). However, as respondent's citation to its statement of the case discloses (Resp. Br., 6-7), the attorneys did not advise their clients of the "development" in question, but only that their presence in court on July 2 was required. Respondent relies on a statement by Mr. Isserman that on June 29 he and Mr. Sacher discussed the illegality of the notice of settlement of the surrender order. Respondent implies that the discussion took place in Green's presence (Resp. Br., 23). But that is not the fact. It is plain from Mr. Isserman's statement (R. 10; Resp. Br., 6) that he did not see Green until later the same day, when he received the assurance that Green would appear on July 2.[6]

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[5] Respondent also cites *Radio Corp. v. Cable Radio Tube Corp.*, 66 F. 2d 778, and other authorities holding that a contemnor may be convicted for violating an order, *knowing that it has been pronounced*, before the order has been drawn up, signed or served (Resp. Br., 25, ftn. 3, 26-27). This principle is obviously inapplicable.

[6] Respondent is also in error in stating (Resp. Br., 23) that the United States Attorney refused a request by Mr. Sacher to postpone the application for the surrender order until after July 4. As appears from respondent's statement of the case (Resp. Br., 5), Mr. Sacher made no such request. What he requested was that the proposed date for the surrender of the defendants be postponed until after the holiday.

3. Having no answer to our contention that since petitioners were charged with actual knowledge of the order of July 2, their convictions cannot be sustained on a different theory of guilt (Pet. Br., 16-17), respondent chooses to ignore it.

It is true that if contempt is an appropriate remedy for disobedience of a surrender order, then absconders reap an advantage by fleeing before the order is issued instead of awaiting its entry. That defect in the law has now been remedied by the enactment of 18 U. S. C. 3146. Certainly, the defect cannot be cured, as in this case, by ignoring the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the guarantees of due process.

## II. The Lack of Jurisdiction to Punish Disobedience of the Surrender Order as a Contempt.

Our principal brief contended: (1) that disobedience of an order for the appearance or surrender of a defendant enlarged on bail was not regarded as a contempt at common law; (2) that such disobedience was, therefore, not punishable as a contempt under section 17 of the Judiciary Act of 1789; (3) that neither the Act of March 2, 1831 nor 18 U. S. C. 401 enlarged the categories of orders for disobedience of which the contempt power may be invoked, and (4) that disobedience of a surrender order is, therefore, not punishable as a contempt under 18 U. S. C. 401 (Pet. Br., 22-25).

Respondent concedes that there was no instance in the whole course of the common law or, indeed, prior to the decision in *Hall* of a contempt prosecution for violation of an order for the appearance or surrender of a bailed defendant (Resp. Br., 33-34).[5] It also concedes that the con-

[5] Respondent agrees that the common law proceeded against absconders by a "process of outlawry" and points out that the same process was employed in this country (Resp. Br., 37, ftn. 7).

tempt power under section 17 of the Judiciary Act of 1789 was co-extensive with the common law power (Resp. Br., 30). It insists, however, that 18 U. S. C. 401 makes disobedience of *any* lawful order a contempt (Resp. Br., 28-29). But respondent does not even attempt a reply to our analysis of the text of 18 U. S. C. 401 and its legislative history, both of which demonstrate that the section does not extend the contempt power to order-disobedience of a kind which was not punishable as a contempt under the first Judiciary Act (Pet. Br., 23-24).

Respondent reviews at length the legislative history of the Act of March 2, 1831 to show that the Act did not *restrict* the common law power of the courts to punish order-disobedience (Resp. Br., 29-32). Of course it did not do so. But the relevant point about the 1831 Act (in which the reference to order-disobedience first appeared) is that it did not *enlarge* the classes of orders for disobedience of which the contempt power could be invoked at common law and under the first Judiciary Act (Pet. Br., 23-24). And respondent has conceded that there is no substantial difference between the Act of 1831 and 18 U. S. C. 401. See, Supplemental Brief for the United States on Reargument, p. 9, ftn. 14, in *Brown* v. *United States*, No. 43, this Term.

Respondent urges that there is no significant difference between disobedience of a subpoena and disobedience of an order for the appearance or surrender of a bailed defendant, and that since the contempt power is available in the first case, it should extend to the second (Resp. Br., 35-36).

Respondent is wrong, historically and logically. The crucial historical difference between the two forms of disobedience is that the first was punished as a contempt at common law,* while the second was not.** The crucial

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* See Resp. Br., 33, ftn. 4.

** Nor has it ever been punished as a contempt except in the cases of the four *Dennis* fugitives.

logical difference between the two is that contempt was and remains the *only* remedy for violation of a subpoena,[10] while there have always been and are other means of vindicating the authority of the court against absconders—i.e., outlawry (until it fell into disuse), forfeiture of bail, and arrest. Accordingly, there is no foundation in necessity for the unprecedented use of the contempt power against the *Dennis* fugitives (see Pet. Br., 25-26).

## III. The Invalidity of the Sentences.

A. We urged that the conclusion that infamous punishment may not be imposed for contempt finds support in the language of 18 U. S. C. 401 and its predecessors (Pet. Br., 28-29). Respondent argues that the phrase "at its discretion" is unambiguous and vests the courts with plenary power over the character of the sentence (Resp. Br., 40-44).[11]

Respondent states that "at its discretion" answers the question, "How long a term of imprisonment?" (Resp. Br., 42). The relevant question, however, is not the length of imprisonment, but its *character*—i.e., whether it involves infamous punishment. When the reference to "discretion" was written into the Act of 1789, there was no statute which determined the character of a sentence by reference to its

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[10] In the absence of a criminal statute

[11] Respondent is in error in stating that the punishment provisions of section 17 of the Judiciary Act of 1789 and its successors were "merely the expression by Congress of the accepted common-law view as to the power of a court to punish contempt" (Resp. Br., 41). For, as respondent points out, a contempt was punishable at common law by both fine *and* imprisonment, while the contempt statutes authorize only fine or imprisonment for the same contempt (Resp. Br., 41, 42).

length. The antecedent to 18 U. S. C. 4083 was not enacted until many years later (see Pet. Br., 27, ftn. 29). Hence, in historical context, the phrase "at its discretion" does not answer the question, "What kind of punishment?"[41] Under the rule of strict construction, therefore, the punishment may not be infamous.

Furthermore, respondent fails to consider the incongruities which its construction of the contempt statutes involves or to discuss the state court decisions which, if correct, require a contrary result (see Pet. Br., 28-29). Nor does respondent attempt to explain the lack of any instance of infamous punishment for contempt during the century and a quarter that followed enactment of the first Judiciary Act (see Pet. Br., 29, 35).[42]

[41] At the time of the enactment of the first Judiciary Act, it was not the place of confinement but other incidents of the sentence, such as hard labor, the pillory, or disqualification from office, which determined the infamous character of the punishment. It was not until 1885 that the Court held that "at the present day" imprisonment in a penitentiary without hard labor is an infamous punishment *Mackin v. United States*, 117 U. S. 348, 352; *United States v. Moreland*, 258 U. S. 433, 448. For a discussion of the origin of the concept of "infamous crimes," see Franklin, *Infamy and Constitutional Liberties*, 14 Lawyers Guild Rev. 1, and *The Encyclopedists' Origin and Meaning of the Fifth Amendment*, 15 *loc. cit.*, 41.

[42] The two state court cases cited by respondent (Resp. Br., 54) are not exceptions. In *Hurley v. Commonwealth*, 188 Mass. 443, the court amended the sentence by changing the place of confinement from the house of correction to a jail. It thereby dispensed with the requirement of hard labor as is evident from the statement (at 448) that "in the absence of any statute, it has been held that imprisonment at hard labor is illegal." Having thus eliminated the infamous features of the punishment, the court stated (*ibid.*) that it became unnecessary to pass on the contention that contempt may not constitutionally be punished as an infamous offense. Accordingly, the decision appears to support our construction of 18 U. S. C. 401. In *Feltner v. Commonwealth*, 30 Ky. L. Rep. 107, 97 S. W. 433, the imprisonment was in the county jail, not a penitentiary. Moreover, the court regarded contempt as a misdemeanor, not a

B. Our principal brief demonstrated that the function of the prevailing usage clause of section 24 of the Clayton Act was to codify the undeviating practice of punishing contempts as offenses not infamous (Pet. Br., 30-31, 35-36). Respondent complains that this was a circuitous way for Congress to fix the character (and hence the maximum term) of imprisonment for contempt (Resp. Br., 46). Respondent's argument is that because the prevailing usage clause uses "circumlocutionary language" (*ibid.*) it should be disregarded entirely. For respondent insists that the sole purpose of section 24 was to confine the jury trial and maximum sentence provisions of section 22 to the type of contempt defined in section 21. But, as we showed, this purpose was fully accomplished by the first clause of section 24 (Pet. Br., 30). Hence, respondent's reading of section 24 makes the prevailing usage clause redundant (see Pet. Br., 36). Moreover, respondent ignores the purpose which animated the contempt provisons of the Clayton Act (see Pet. Br., 35-36).

Respondent relies on the statement in a committee report that sections 21-24 of the Clayton Act "deal entirely with questions of Federal procedure relating to injunctions and contempts committed without the presence of the

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felony. These facts appear from the opinion in the companion case, *French* v. *Commonwealth*, 147 S. W. 427. Later in its brief (Resp. Br., 57), respondent cites two state court decisions subsequent to 1914 affirming contempt sentences of more than one year. But *Dolan* v. *Commonwealth*, 304 Mass. 325, did not involve infamous punishment since the confinement was to a common jail. And in *People* v. *Montesano*, 293 Ill. App. 630, it does not appear from the abstract of the decision or from the reporter's headnote (12 N. E. 2d 915) whether the sentence was to a jail or a penitentiary. Thus, respondent's research confirms our statement (Pet. Br., 33) that there has never been a single reported instance of infamous punishment for contempt in the state courts.

court" (Resp. Br., 50).[13] This statement is entirely consistent with our construction of the prevailing usage clause. For the clause did not "deal with" — i.e., change — the procedure for punishment of contempts excluded from the provisions of section 22. On the contrary, it required adherence to the procedure which had previously prevailed.[14]

Respondent states that the controlling statute is no longer section 24 of the Clayton Act but its 1948 codification in 18 U. S. C. 402 (Resp. Br., 56). Respondent does not indicate the materiality of that fact, and it has none. Respondent tacitly concedes that the codification did not change the substance or effect of the original enactment (see Pet. Br., 31-32). It cites five cases of infamous punishment for contempt, decided between 1916 and 1948 (Resp. Br., 57). But since none of these cases considered the effect of the prevailing usage clause, the rule that re-enactment of a statute incorporates prior judicial interpretations of its provisions is inapplicable.

C. Our principal brief urged that contempt may not be punished as an infamous offense because Criminal Rule 7 requires all infamous offenses (felonies) to be prosecuted by indictment (Pet. Br., 33). Respondent points out that

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[13] It is obvious that this and the other committee reports cited by respondent (Resp. Br., 50-53) use the term "procedure" to designate a limitation on sentence as well as the requirement of a jury trial. For section 22 modifies the prior "procedure" in both of these aspects.

[14] Respondent also argues that decisions prior to 1914 indicate that the courts thought that they had unlimited discretion over the duration of imprisonment for contempt (Resp. Br., 55). It cites observations in two cases in support of this contention. In one, the sentence was a $500 fine. *In re Maney*, 205 Fed. 629. In the other, the sentence was a $25 fine and two days in jail. *Carter v. Commonwealth*, 96 Va. 791.

under Rule 7 offenses not infamous (misdemeanors) *may* be prosecuted by indictment or information, while under Rule 42 contempts are not prosecuted by either method. Hence, it is argued, the term "offense" in Rule 7 cannot embrace contempts because, if it did, the Rule would exclude their prosecution by the modes specified in Rule 42 (Resp. Br., 61-62). However, respondent overlooks the fact that the provision of Rule 7 for prosecution of misdemeanors by indictment or information is *permissive* and, therefore, does not exclude other modes of prosecution of an offense (in this case, contempt) as to which the Rules make specific provision.

D. Respondent devotes thirteen pages (Resp. Br., 63-76) to its contention that the imposition of infamous punishment for contempt does not raise a substantial constitutional question under the requirement of the Fifth Amendment that infamous crimes shall be prosecuted by indictment. It cites a number of cases in which the Court has stated that criminal contempt has always been regarded as *sui generis*. But at best, this label [13] merely states the problem; it provides no solution.

Despite the confusion which clouds the thinking about criminal contempts, three propositions may be stated with assurance. First, the Court has held that they are not *sui generis* with respect to many constitutional and statutory provisions for the protection of those accused of crime (see Pet. Br., 38, ftn. 45). Second, the Court has never had occasion to decide whether contempt may constitutionally

[13] Judge Hand characterized it as "a favorite evasion" (R. 76).

be punished as an infamous crime.[18] Third, a decision that the Fifth Amendment bars infamous punishment for contempts has not been foreclosed by the holding that they need not, constitutionally, be tried to a jury (see Pet. Br., 39).

Respondent contends that Lord Wilmot's statement concerning the "immemorial usage" of prosecuting contempts summarily was not erroneous with respect to contempts involving disobedience of the King's writ (Resp. Br., 72-73). Be that as it may, both history and experience furnish ample support for the statement of Mr. Justice Holmes (in a case involving order-disobedience) that:

> "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure,

[18] The observation in *Ex parte Hudgings*, 249 U. S. 378, 383 (Resp. Br., 66) that contempt "is not controlled by the limitations of the Constitution as to modes of accusation" was dictum. Moreover, it was confined to "contempt committed in the presence of the court." The observation in *In re Debs*, 158 U. S. 564, 594 (Resp. Br., 67) that in contempt cases "the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court" was likewise dictum as it was intended to apply to the mode of accusation. Moreover, at most, the Court indicated that criminal contempts are prosecuted without indictment, and not that they are subject to infamous punishment. The statement in *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 335, that "a proceeding in contempt cannot be considered as an infamous crime" is ambiguous. For it is unclear whether the Court believed that criminal contempt is not a "crime," or thought that, although a "crime," it is not subject to infamous punishment. It would appear that the Court was of the latter view since what it decided was that criminal contempts were "criminal cases" within the Court of Appeals Act.

3 Transactions of the Royal Historical Society, N. S. p. 147 (1885) * * * "[17] *Gompers* v. *United States*, 233 U. S. 604, 610-11.

And it has been said that this statement in a "landmark" contempt case presages that "the Supreme Court is not likely to embalm exploded history in the Constitution." Frankfurter and Landis, *Power of Congress Over Procedure in the "Inferior" Federal Courts—A Study in the Separation of Powers*, 37 Harv. L. Rev., 1010, 1011-12.

Plainly, the constitutional question presented by the sentence in this case is substantial. The interpretation of 18 U. S. C. 401, 18 U. S. C. 402 and Criminal Rule 7 for which we contend should therefore be adopted. For, "So to interpret is in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely*, 345 U. S. 41, 47.

Respectfully submitted,

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[17] The citation is to the statement of Solly-Flood that "no instance whatever has yet been found * * * of any committal *in penam* by the Court of King's Bench in a summary manner, and without indictment, presentment, information, or arraignment for contempt, committed even in its presence, up to a considerable period after the death of Henry IV." Fox believed that Solly-Flood erred in not excepting contempts committed by officers of justice or in the actual view (as distinguished from the "presence") of the court. See, Fox, *The History of Contempt of Court* (1927), pp. ix, 50.